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YEARBOOK OF ANTITRUST AND REGULATORY STUDIES
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Editorial foreword

The editorial board is pleased to present the 14th volume of the Yearbook of Antitrust and Regulatory Studies (YARS 2016, 9(14)).

We are honoured to begin this volume with a guest article written by Professor Daniel Barnhizer (Michigan State University College of Law), a contribution which examines one of the big issues of our times – "Contracts and Automation: Exploring the Normativity of Automation in the Context of U.S. Contract Law and E.U. Consumer Protection Directives".

Continuing the tradition set by YARS in 2013, the papers published in the current volume focus not only on the Polish competition law regime, but present also the national competition laws of other CEE countries as well as the Caucasus.

In the 'Articles' section, the current volume provides an insight into a variety of issues. They relate, first of all, to private enforcement of competition law. It seems that this is the last moment to try to provide *de lege ferenda* suggestions for EU Member States before the transposition of the Damages Directive (Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union) into their national legislation. What suggestions can be made in this regard to Poland and Hungary? Answers to this question can be found in two articles. The paper written by Dominik Wolski looks at the principle of liability in private antitrust enforcement in selected European states in light of the implementation of the Damages Directive into the Polish legal system. Tihamér Tóth presents the Hungarian perspective on private enforcement and collective redress of EU competition law. Jurisdictional questions, collecting evidence, the interaction of public and private enforcement as well as collective redress prove to be among the most debated issues according to reports from Member States.

The current volume contains also a paper on the effectiveness of judicial review in the Polish competition law system (Maciej Bernatt). Is the Polish

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status quo satisfactory or not? It needs to be noted that this paper considers the permissibility of judicial deference. Worth recommending is the article written by Kseniia Smyrnova which contains a comparative analysis of the collective dominance definition in Ukrainian and European law on the example of the electricity market case. Included in the 'Articles' section of this YARS volume is a paper that introduces the issues of competition law and state aid for failing banks in the EU and its specific implications for CEE Member States (Virág Blazsek). Finally, the 'Articles' section provides readers with a great opportunity to familiarise themselves with the topic of regional rail transport in Poland, the Czech Republic and Slovakia, including its current models and history, as well as its spatial and socio-economic context (Marcin Król, Jakub Taczanowski).

Aside from the above research papers, the current volume of YARS contains also a number of national legislation and case law reviews. The first contribution contains a review of Georgian legislation and case law on merger control (Solomon Menabdishvili). Provided next is an overview of the new Kazakhstani anti-monopoly regulation (Alexander Korobeinikov). It is followed by critical assessment of 2015 developments in Polish competition law (Anna Piszcz). Discussed next is the 2016 Amendment of the Czech Significant Market Power Act of 2009 (Petr Frischmann, Václav Šmejkal). The final contribution consists of a review of the new Polish model of abstract control of standard forms of agreements concluded with consumers (Paulina Korycińska-Rządca).

The current volume of YARS also offers four case comments. This section opens with Sandra Marco Colino's reflections on the judgment of the General Court in case *Orange Polska v European Commission*. Olga Stefanowicz and Bartosz Targański analyse two preliminary rulings of the Court of Justice regarding anti-competitive practices (respectively, *SIA 'Maxima Latvija' v Konkurences padome* and *'Eturas' UAB v Lietuvos Respublikos konkurencijos taryba*). There is also something for those who prefer State aid issues, a comment by Tihamér Tóth to the judgment of the Court of Justice in case *Electrabel SA, Dunamenti Erőmű Zrt. v European Commission*.

In its next section, YARS contains the review of a Piotr Semeniuk's book published in 2015 in Poland regarding the concept of a single economic unit in competition law.

The final section of the current volume of YARS is devoted to 'Reports'. This section covers, first, the national conference on the pursuit before Polish courts of actions for damages based on competition law infringements which was held in Warsaw in April 2016. The following report concerns an event that took place in Łódź in May 2016 – the third national conference devoted to consumers in the rail passenger market. The last reported gathering, the 4th

Polish-Portuguese PhD Students' Conference on Competition Law, was held at the University of Białystok in June 2016 (it is worth mentioning that the 5th international conference of this series has already taken place in Białystok in October 2016). The 'Reports' section concludes with a Special Report on the Centre for Business Law and Practice at the University of Leeds.

I end this brief editorial note with expressions of deep gratitude. I wish to thank the authors and various anonymous reviewers who willingly gave their time and expertise to contribute to the current volume.

Białystok, 22nd November 2016

Anna Piszcz
YARS Volume Editor

List of acronyms

Institutions

AMCU – Antimonopoly Committee of Ukraine
CAT – Competition Appeal Tribunal (UK)
CFI – Court of First Instance
CJ – Court of Justice
CJEU – Court of Justice of the European Union
CMA – Competition and Markets Authority (UK)
DG – Directorate General
EC – European Commission
ECB – European Central Bank
ECJ – European Court of Justice
GC – General Court
ICSID – International Centre for Settlement of Investment Disputes
NCA – National Competition Authority
NEURC – National Energy and Utilities Regulatory Commission of Ukraine
NRA – National Regulatory Authority
SA – Appellate Court of Warsaw, *Sąd Apelacyjny w Warszawie* (Poland)
SN – Supreme Court, *Sąd Najwyższy* (Poland)
SOKiK – Court of Competition and Consumers Protection, *Sąd Ochrony Konkurencji i Konsumentów* (Poland)
UKE – Office for Electronic Communications, *Urząd Komunikacji Elektronicznej* (Poland)
UOKiK – Office for Competition and Consumers Protection, *Urząd Ochrony Konkurencji i Konsumentów* (Poland)
UTK – Office of Rail Transport, *Urząd Transportu Kolejowego* (Poland)

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Legal acts

ACCP – Polish Competition and Consumer Protection Act
APEC – Czech Act No. 143/2001 Coll. on protection of economic competition
ARC – German Act Against Restrains Competition
CC – Polish Civil Code of 23 April 1964
ECHR – European Convention on Human Rights
ECT – Energy Charter Treaty
GVH – Hungarian Competition Authority
LC – Law on Competition (Georgia)
LPEC – Law on the Protection of Economic Competition (Ukraine)
SMP – Significant Market Power
SMPA – Czech Significant Market Power Act of 2009
TEC – Treaty establishing the European Community
TFEU – Treaty on the Functioning of the European Union

Other acronyms

AG – Advocate General
AO(s) – alternative operator(s)
BSA – bitstream access
CEE – Central and Eastern Europe(an)
CEECs – Countries of Central and Eastern Europe
CIT – Corporate Income Tax
CZK – Czech koruna
DB – Deutsche Bahn
ECR – European Court Reports
EFTA – European Free Trade Association
EU – European Union
GDP – gross domestic product
GEL – Georgian lari
HUF – Hungarian Forint
iKAR – *internetowy Kwartalnik Antymonopolowy i Regulacyjny* (Poland)
LLU – local loop unbundling
MEI(P) – Market Economy Investor (Principle)

OJ – Official Journal
PIT – Personal Income Tax
PLN – Polish złoty
PMEIT – private market economy investor test
PPA(s) – power purchase agreement(s)
SO – Statement of Objections
SSM – Single Supervisory Mechanism
UK – United Kingdom
YARS – Yearbook of Antitrust and Regulatory Studies

G U E S T A R T I C L E

Contracts and Automation: Exploring the Normativity of Automation in the Context of U.S. Contract Law and E.U. Consumer Protection Directives

by

Daniel Barnhizer*

CONTENTS

Abstract

Given a choice between two systems of contract rules, a court or legislature may have a normative obligation to adopt the rule that is more susceptible to coding and automation. This paper explores the ramifications of that normative proposition through the lens of multiple contract doctrines that traditionally involve "messy" judgments or multiple interacting judgments regarding which human beings are – arguably – capable of making finely nuanced analyses. Using the common law doctrine of unconscionability and Polish Civil Code Article 385 on unfair terms in

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consumer contracts, this paper explores the differences between contract rules that require human analysis versus those that can be applied with strong reliability by automated processes. Finally, the paper analyzes some of the potential pitfalls of this normative proposition in light of technological, economic, and moral/ethical concerns.

Résumé

En donnant le choix entre deux systèmes de règles contractuelles, un tribunal ou une législature peut avoir l'obligation normative d'adopter une règle qui est plus susceptible de codification et d'automatisation. Cet article analyse les conséquences de cette proposition normative à travers des différentes doctrines contractuelles qui impliquent traditionnellement des jugements "désordonnés" ou des jugements multiples dépendant de la profondeur de l'analyse. En faisant la référence à la doctrine de "common law" de l'inconscience et à l'article 385 de Code Civil polonais concernant les clauses contractuelles abusives dans les contrats conclus avec les consommateurs, cet article explore les différences entre les règles contractuelles qui exigent une analyse humaine et celles qui peuvent être appliquées avec une grande fiabilité par des processus automatisés. Enfin, le document analyse certaines difficultés potentiels de cette proposition normative à la lumière des préoccupations technologiques, économiques et morales / éthiques.

Key words: contract automation; unconscionability; consumer protection; dispute resolution.

JEL: K12; K40; O33

I. Introduction

The processes associated with the practice of contracting and the practice of law have achieved high levels of automation. Automation in contracting has been around since the first standard form contracts eliminated individualized judgments and negotiations over contract terms. From there, contract automation has extended beyond mere mass produced contract forms to sophisticated contract assembly, machine contracting, and so-called "smart contracts" that are self-enforcing across a wide range of performance actions by the parties. Likewise, the practice of law in creating and developing new contract tools has followed a similar automation curve, increasing in complexity over time.

In contrast, contract common law itself has largely trailed this tendency towards automation. To some extent, it is inevitable that contract doctrines must lag behind changes in practice, but given the changes in contracting

A R T I C L E S

The Interaction of Public and Private Enforcement of Competition Law Before and After the EU Directive – a Hungarian Perspective

by

Tihamér Tóth*

CONTENTS

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Abstract

The paper explores the changes the EU Directive on harmonizing certain rules governing actions for damages under national law for infringements of the competition law provisions will bring about in Hungary, with a special focus placed on damages liability rules, the interaction of public and private enforcement of these rules, and the importance of class actions. Amendments of the Competition Act introduced in 2005 and 2009 had created new rules to promote the idea of private enforcement even before the Directive was adopted. Some of these rules remain unique even now, notably the legal presumption of a 10% price increase for cartel cases. However, subsequent cases decided by Hungarian courts did not reflect the sophistication of existing substantive and procedural rules. There has only ever been one judgment awarding damages, while most stand-alone cases involved minor competition law issues relating to contractual disputes. The paper looks at the most important substantial rules of tort law (damage, causality, joint and several liability), the co-operation of competition authorities and civil courts, as well as at (the lack of) class action procedures from the perspective of the interaction of public and private enforcement of competition law.

Résumé

Le document analyse les changements apportés par la directive européenne relative aux certaines règles régissant les actions en dommages et intérêts en droit national pour les infractions aux dispositions du droit de la concurrence en Hongrie, en particulier concernant les règles sur la responsabilité civile en matière de dommages, l'interaction de l'application publique et privée du droit de la concurrence et l'importance des recours collectifs. Les modifications à loi de la concurrence introduites en 2005 et 2009 ont créé de nouvelles règles pour promouvoir l'idée d'une application privée du droit de la concurrence même avant que la directive a été adoptée. Certaines de ces dispositions sont toujours uniques, notamment la présomption légale d'une augmentation de prix de 10% par les ententes. Néanmoins, les jugements ultérieurs rendus par les tribunaux ne reflétaient pas les règles de fond et de procédures sophistiquées. Il n'y avait juste le jugement qui a accordé des dommages et intérêts, alors que la plupart des actions autonomes (« stand-alone actions ») portaient sur des problèmes secondaires du droit de la concurrence liés aux conflits contractuels. L'article examine des règles les plus importantes du droit de la responsabilité civile (le dommage, la causalité, la responsabilité solidaire), la coopération entre les autorités de la concurrence et les tribunaux civils, ainsi que l'absence de mécanisme de recours collectifs et de la perspective de l'application publique et privée du droit de la concurrence.

Key words: private enforcement of competition law; public enforcement; discovery; leniency; damages; joint and several liability; *amicus curiae*; class action; representative action.

JEL: K13; K15; K21; K41

The Principle of Liability in Private Antitrust Enforcement in Selected European States in Light of the Implementation of the Damages Directive into the Polish Legal System

by

Dominik Wolski*

CONTENTS

Abstract

In the vast majority of European countries, private antitrust enforcement falls under general rules of civil law. One of the issues to be discussed in relation to this type of litigation is the principle of liability, which exists in the given legal system, and

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its presumed impact on private enforcement. This problem has been debated in the course of the implementation works on the Damages Directive into the Polish legal system. A discussion on the principle of liability has taken place at least twice in this context. First, the issue was considered by the Civil Law Codification Commission and expressed in its Assumptions behind the Draft Act on complaints for damages caused by the breach of competition law. Subsequently, the principle of liability was assessed again at the reconciliation conference held at the Ministry of Justice. This is but a part of a broader discussion about the relationship between the rule of liability existing in national laws being applied to private enforcement cases and EU law as well as limitations arising from the latter. After outlining this interplay, the paper will briefly introduce solutions adopted with respect to the principle of liability in the context of private enforcement in selected European countries. The selection is not random, despite the fact that a limited number of countries has been analysed – eight including Poland. These include the most advanced EU Member States when it comes to private antitrust enforcement (such as the UK, Germany or the Netherlands), along with less developed examples (such as Italy or France), and even underdeveloped countries when it comes to the number and popularity of private antitrust litigations (such as Lithuania and Poland). This sort of analysis paints a relatively comprehensive picture of the adopted solutions in relation to the principles of liability governing private enforcement cases in Europe. The same is true for the issue of the burden of proof and presumptions/binding power in civil proceedings of decisions issued by competition authorities. Furthermore, what seemed to be crucial for the drafters of the Damages Directive, this sort of analysis makes it possible to formulate certain conclusions with respect to the relationship between the effectiveness of private enforcement in a given State and the adopted principle of liability. The final conclusions understandably focus on the Polish example, that is, the implementation of the Damages Directive into the Polish legal system.

Résumé

Dans la grande majorité des pays européens l'application privée du droit de la concurrence relève des règles générales du droit civil. Un de problème qui exige l'analyse dans ce type de litige est le principe de la responsabilité qui existe dans le système juridique particulier, ainsi que son effet sur l'exécution privée du droit de la concurrence. Ce problème était discuté pendant les travaux concernant la transposition de la directive relative aux certaines règles régissant les actions en dommages («Damages Directive») dans le système juridique polonais. La discussion sur le principe de la responsabilité a eu lieu au moins deux fois dans ce contexte. Tout d'abord, la question a été examinée par la Commission de codification du droit civil et exprimée dans ses hypothèses concernant le projet de loi sur les actions en dommages pour les infractions aux dispositions du droit de la concurrence. Ensuite, le principe de la responsabilité a été évalué de nouveau lors de la conférence de réconciliation qui a eu lieu au Ministère de la Justice. C'est juste une partie de discussion plus large concernant la relation entre le principe de la responsabilité existant dans les législations nationales

appliquées dans des affaires d'application privée du droit de la concurrence et le droit de l'Union européenne, ainsi que les limitations qui en découlent. Après la présentation cette interaction, le document parlera brièvement des solutions adoptées dans certains pays européens afin de répondre au problème du principe de la responsabilité dans le contexte de l'application privée du droit de la concurrence. La sélection n'est pas aléatoire, malgré le fait qu'un nombre limité de pays a été analysé – huit pays dont la Pologne. Elle inclus les Etats Membres de l'Union européenne les plus avances en ce qui concerne l'application privée du droit de la concurrence (comme le Royaume-Uni, l'Allemagne ou les Pays-Bas), ainsi que des exemples de juridictions moins développés (comme l'Italie ou la France) et même des pays sous-développés en ce qui concerne le nombre et la popularité des actions en dommages dans le domaine du droit de la concurrence (comme la Lituanie et la Pologne). Ce type d'analyse donne une vision relativement complète des solutions concernant les principes de responsabilité dans le domaine d'application privée du droit de la concurrence adoptées en Europe. C'est la même chose en ce qui concerne la question de la charge de la preuve et des présomptions/le pouvoir contraignant des décisions rendues par les autorités de la concurrence dans les procédures civiles. En outre, ce qui semblait crucial pour les rédacteurs de «amages Directive», ce type d'analyse permet de formuler certaines conclusions concernant la relation entre l'application privée du droit de la concurrence dans un État Membre particulier et le principe de responsabilité adopté dans cet État. Les conclusions finales se focalisent sur l'exemple polonais, c'est-à-dire sur la transposition de «amages Directive» dans le système juridique polonais.

Key words: private antitrust enforcement; litigations; principle of liability; burden of proof; presumptions; implementation; Damages Directive; effectiveness.

JEL: K13; K21; K42

I. Introductory issues

Private antitrust enforcement is often closer associated with antitrust enforcement as such, in its public dimension, than with private law and its principles. This realisation is not surprising seeing as antitrust enforcement was for many years clearly more public than private, maybe except the USA and its legacy. Even now, after the extensive efforts undertaken by the European Commission (hereinafter, EC) in order to trigger the private model of antitrust enforcement in Europe, the public pillar continues to remain the main form of EU competition policy. On the other hand, all the efforts exerted by EU institutions, including the Damages Directive[1], should ultimately bring

[1] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of

Effectiveness of Judicial Review in the Polish Competition Law System and the Place for Judicial Deference

by

Maciej Bernatt*

CONTENTS

* Assistant Professor, University of Warsaw, Faculty of Management, Department of European Economic Law (Jean Monnet Chair) and Scientific Secretary of the Centre for Antitrust and Regulatory Studies at the University of Warsaw; e-mail: mbernatt@wz.uw.edu.pl. This article reflects author's broader research on judicial deference in administrative and competition law funded by Poland's National Science Centre (decision 2014/15/D/HS5/01562). Article received: 17 November 2016; accepted: 30 November 2016.

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Abstract

The article discusses the effectiveness and the intensity of judicial review in the Polish competition law system. First, it studies whether the judicial review offered by the 1st instance Court of Competition and Consumer Protection in Warsaw (SOKiK) is effective in practice. Next, the article analyzes whether Polish courts tend to defer to the findings of the Polish competition authority, UOKiK. Judgments of the Supreme Court concerning relevant market definition serve as case studies. Finally, the article discusses whether proceedings before the Polish competition authority ensure sufficient due process guarantees, the impartiality of decision-makers, and the overall expert character of UOKiK's decision-making process. On this basis the article examines whether there are grounds for the reviewing courts to defer to UOKiK's findings. The article concludes that currently the review undertaken by SOKiK happens to be superficial and thus ineffective. At the same time, the Supreme Court's review of the determination of the relevant market is not deferential towards UOKiK's findings. The Supreme Court substitutes its own definition of the relevant market for that of UOKiK and that of the lower courts. However, the article shows that there are no grounds at the moment for arguing for greater judicial deference. Proceedings held before UOKiK, despite recently introduced improvements, still do not offer sufficient due process guarantees or a division between investigatory and decision-making functions. In addition, UOKiK's expertise is not sufficient for both institutional and practical reasons.

Résumé

L'article analyse l'efficacité et de l'intensité du contrôle juridique dans le droit de la concurrence en Pologne. Premièrement, il examine si le contrôle juridique mené par la cour de première instance, la Cour de la concurrence et de la protection des consommateurs à Varsovie (SOKiK), est efficace. Ensuite, l'article analyse si les tribunaux polonais ont tendance à se référer aux décisions de l'Autorité polonaise de la concurrence (UOKiK). Les arrêts de la Cour suprême concernant la définition du marché pertinent font l'objet d'études de cas. Enfin, l'article examine si les procédures devant l'Autorité polonaise de la concurrence assurent des garanties du procès équitable, l'impartialité des décideurs et le caractère expert du processus décisionnel de l'UOKiK. Par cette analyse, l'article tente à déterminer s'il existe des motifs que les tribunaux font preuve de déférence à l'égard des décisions de l'UOKiK. L'article conclut que la révision par le SOKiK est actuellement superficielle et inefficace. En même temps, la révision judiciaire de la détermination du marché pertinent par la Cour suprême ne fait pas preuve de déférence à l'égard des décisions de l'UOKiK. La Cour suprême change sa propre définition du marché pertinent par celle de l'UOKiK et des tribunaux inférieurs. Toutefois, l'article montre qu'il n'existe actuellement aucun motif de plaider pour une déférence judiciaire plus importante. Les procédures devant l'UOKiK, malgré les améliorations récemment introduites, n'offrent pas encore suffisamment de

garanties du procès équitable, ainsi que la répartition des fonctions d'enquête et des fonctions décisionnelles. De plus, l'expertise de l'UOKiK n'est pas suffisamment présente autant que pour des raisons institutionnelles tant que pour des raisons pratiques.

Key words: competition law; antitrust; judicial review; judicial deference; due process; procedure; courts; administration; EU; Central and Eastern Europe; Poland.

JEL: K21; K23; K49; L41; L42

I. Introduction

The judicial review of the decisions issued by Poland's National Competition Authority is exercised by civil courts in *de novo,* contradictory judicial proceedings. From a law in books viewpoint, such review model differs significantly from the cassatory, administrative model operating in EU competition law. The adequacy of judicial review in competition law has been widely discussed in the EU by many scholars and practitioners (Bailey, 2004; Vesterdorf, 2005; Schweitzer, 2009; Castillo de la Torre, 2009; Gerard, 2011; Forrester 2011, Van Cleynenbreugel, 2011–2012; Nazzini 2012; Wils 2014; Nagy, 2016; Bernatt, 2016b; Kalintiri, 2016). Some of them argue for a more intense judicial review (see in particular Gerard, 2011; Forrester, 2011). In Poland's neighbouring Visegrad countries – Hungary, Slovakia and the Czech Republic – the adequacy of judicial review is also discussed in different contexts (Šramelová, Šupáková, 2012; Cseres, Langer, 2009; Neruda, Barinka, 2015). From this perspective, a closer study of the Polish model of judicial review has the potential to enrich this debate. The question is whether a formally broader judicial review offers, in practice, better room for handling competition law disputes – provides the space for effective judicial review while preserving the competition authority's ability to enforce competition law.

This article focuses on the effectiveness and the intensity of judicial review of the decisions issued by Poland's National Competition Authority (*Prezes Urzędu Ochrony Konkurencji i Konsumentów*, hereinafter: UOKiK) as well as the permissibility of judicial deference to UOKiK's findings under the current Polish enforcement framework. The article assumes that the effectiveness of judicial review and judicial deference are interrelated. This is because the concept of judicial deference is not about imposing limits on the scope of judicial review (by distinguishing the areas that are beyond judicial review) and so it should not be understood as an excuse for courts to abdicate their

A Comparative Analysis of the Collective Dominance Definition in Ukrainian and European Law – the Electricity Market Case

by

Kseniia Smyrnova*

CONTENTS

Abstract

This paper follows a comparative approach to the analysis of collective dominance doctrine and practice in the EU and the enforcement practice in Ukraine. The aim of this paper is to assess the compliance of the Ukrainian competition authority's (AMCU) analysis of the national electricity market with EU law enforcement practice. The latter arises from Ukraine's wider duty to fulfil its international law obligation to comply with EU competition rules, based on Article 18 of the Treaty establishing the Energy Community also taking into account the interpretative criteria developed in EU case law (according to Article 94 of the Association Agreement between Ukraine and the EU). Article 255 of the Association Agreement, which clearly provides for the use of the principle of transparency, non-discrimination and neutrality when complying with the procedures of fairness, justice and the right of defence, also illustrates the necessity of carrying out research in this field.

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The paper examines notions such as: the dominance doctrine, market power definition, economic strength and collective dominance in the EU enforcement practice. Special attention is placed on enforcement practice in the electricity market. Since the scrutinised market inquiry constitutes the first investigation into the Ukrainian electricity market, there is no national practice on this issue yet. For this reason, the analysis follows a wide comparative approach towards the principles of collective dominance in the electricity market in Ukraine.
The paper concludes that the AMCU's approach to the regulation of the electricity market in Ukraine confirms the necessity to reform the system of state regulation in the wholesale electricity market and in the market of services for electricity transmission. In order to develop competition in the electricity market, it is also necessary to change the system for tariff and pricing policy formation on the part of the National Energy and Utilities Regulatory Commission of Ukraine and the Ministry of Energy and Coal-Mining Industry of Ukraine. Stressed is also the necessity to follow the approach and criteria of EU competition law with regard to the determination of market dominance. This requirement is stipulated by Ukraine's international legal obligations arising from Articles 18 and 94 of the Treaty establishing the Energy Community and Article 255 of the Association Agreement between the EU and Ukraine.

Résumé

Le présent article utilise une approche comparative afin d'analyser la doctrine et la pratique de la dominance collective dans l'Union européenne, ainsi que la pratique d'application du droit de la concurrence en Ukraine. L'objectif de l'article est d'évaluer la conformité de l'analyse de l'autorité ukrainienne de la concurrence ("AMCU") concernant le marché national de l'électricité avec la pratique de l'Union européenne dans cette matière. La conformité mentionnée ci-dessus découle de l'obligation internationale de l'Ukraine d'assurer la cohérence avec les règles européen du droit de la concurrence, basée sur l'article 18 du Traité instituant la Communauté de l'énergie, en tenant compte également des critères interprétatifs développés dans la jurisprudence de l'Union européenne (l'article 94 d'Accord d'association entre l'Ukraine et l'Union européenne). L'article 255 de l'Accord d'association, qui prévoit clairement l'obligation d'application du principe de transparence, de non-discrimination et de neutralité dans le respect des procédures d'équité, de justice et de défense, démontre également la nécessité de mener des recherches dans ce domaine. Le document examine des notions telles que: la doctrine de la domination, la définition du pouvoir de marché, la force économique et la domination collective dans la pratique européenne de l'application du droit de la concurrence. Une attention particulière est accordée à la pratique d'application dans le domaine de marché de l'électricité. Vu que c'est la première analyse détaillée du marché ukrainien d'électricité, il n'existe pas encore le pratique nationale concernant ce sujet. Pour cette raison l'article utilise une approche comparative aux principes de dominance collective sur le marché de l'électricité en Ukraine.

L'article conclut que l'approche de l'AMCU à la réglementation du marché de l'électricité en Ukraine confirme la nécessité de réformer le système de réglementation étatique sur le marché de gros de l'électricité et sur le marché des services de transmission d'électricité. Afin de développer la concurrence sur le marché de l'électricité, il est également nécessaire de modifier le système de formation des prix et tarifs par la Commission nationale de réglementation de l'énergie et des services publics d'Ukraine et par le Ministère de l'Energie et de l'Industrie minière du charbon de l'Ukraine. L'article souligne également qu'il est nécessaire de suivre l'approche et les critères du droit européen de la concurrence en ce qui concerne la détermination de la dominance. Cette obligation découle des articles 18 et 94 du traité instituant la Communauté de l'énergie et de l'article 255 de l'Accord d'association entre l'Union européenne et l'Ukraine.

Key words: competition; collective dominance; EU; Ukraine; Antimonopoly Committee of Ukraine; wholesale electricity market.

JEL: K21; K23

I. Introduction

Ratified in September 2014, the EU-Ukraine Association Agreement[1] is meant to ensure an effective competitive environment within the established free-trade area (Articles 253–267), it reproduces rules of EU competition law and contains provisions strictly referring to those rules (Smyrnova, 2015). Ukraine is a member of the Energy Community[2] and has to fulfil obligations concerning the implementation of *acquis*, particularly in the electricity sector. More specifically, Article 18 of the Treaty establishing the Energy Community provides for the adherence with competition rules in this market (detailed in Appendix III which, in fact, reproduces EU competition rules found in Articles 101, 102, 106 and 107 TFEU). At the same time, the Association Agreement determines the compliance between its provisions and the

[1] The Law of Ukraine "On the Ratification of the Association Agreement between Ukraine, on the One Part, and the European Union, the European Atomic Energy Community and Their Member States, on the Other Part", Gazette of the Verkhovna Rada of Ukraine 2014, No. 40, p. 2021.

[2] On 18 December 2009, the Government Council of the Energy Community has made the decision of Ukraine's full-fledged membership in this international organization. The protocol of Ukraine's entering the Energy Community was signed on 24 September 2010 and ratified by the Verkhovna Rada of Ukraine in December 2010. The protocol provides for the inclusion of Ukraine into the members of Energy Community (Article 1) and contains the schedule of *acquis* implementation by Ukraine in the energy industry (Article 2) until 1 January 2018.

Competition Law and State Aid for Failing Banks in the EU and its Specific Implications for CEE Member States

by

Virág Blazsek*

CONTENTS

Abstract

The bank bailouts following the global financial crisis of 2008 have been subject to prior approval of the European Commission (EC), the competition authority of the European Union. The EC was reluctant to reject rescue efforts directed at failing banks and so it consistently approved all such requests submitted by Member States. Out of the top twenty European banks, the EC authorized State aid to at least twelve entities. In this context, the paper outlines the gradually changing interpretation of EU State aid rules, the "temporary and extraordinary rules" introduced starting from late 2008, and the extension of the "no-State aid" category. The above shifts show that the EC itself deflected from relevant EU laws in order to systemically rescue important banks in Europe and restore their financial stability.

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The paper argues that bank bailouts and bank rescue packages by the State have led to different effects on market structures and consumer welfare in the Eurozone and non-Eurozone areas, mostly the Eastern segments of the European Union. As such, it is argued that they are inconsistent with the European common market. Although the EC tried to minimize the distortion of competition created as a result of the aforementioned case law primarily through the application of the principle of exceptionality and different compensation measures, these efforts have been at least partially unsuccessful.
Massive State aid packages, the preferential treatment of the largest, or systemically important, banks through EU State aid mechanisms – almost none of which are Central and Eastern European (CEE) – may have led to the distortion of competition on the common market. That is so mainly because of the prioritization of the stability of the financial sector and the Euro. The paper argues that State aid for failing banks may have had important positive effects in the short run, such as the promotion of the stability of the banking system and the Euro. In the long-run however, it has contributed to the unprecedented sovereign indebtedness in Europe, and contributed to an increased economic and political instability of the EU, particularly in its most vulnerable CEE segment.

Résumé

Les sauvetages bancaires consécutifs à la crise financière mondiale de 2008 ont été soumis à l'approbation préalable de la Commission européenne (CE), l'autorité de la concurrence de l'Union européenne. Les CE étaient réticentes à rejeter les efforts de sauvetage dirigés contre les banques défaillantes et ont donc approuvé de manière cohérente toutes les demandes présentées par les États membres. Sur les vingt premières banques européennes, la CE a autorisé des aides d'État au moins douze entités. Dans ce contexte le document souligne l'évolution progressive de l'interprétation des règles de l'UE en matière d'aides d'État, les «règles temporaires et extraordinaires» introduites à partir de la fin de 2008 et l'extension de la catégorie «sans aides d'État». Les changements susmentionnés montrent que la CE elle-même a dévié des lois pertinentes de l'UE afin de sauver systématiquement d'importantes banques en Europe et de rétablir leur stabilité financière.
L'article soutient que les plans de sauvetage bancaire et les plans de sauvetage bancaire de l'État ont eu des effets différents sur les structures du marché et sur le bien-être des consommateurs dans les zones de la zone euro et hors zone euro, principalement dans les segments orientaux de l'Union européenne. En tant que tel, il est soutenu qu'ils sont incompatibles avec le marché commun européen. Bien que les CE aient essayé de minimiser les distorsions de concurrence créées par la jurisprudence susmentionnée, principalement par l'application du principe d'exception et des mesures de compensation différentes, ces efforts ont été au moins partiellement infructueux.
Les paquets massifs d'aides d'État, le traitement préférentiel des banques les plus importantes ou systématiquement importantes par le biais des mécanismes d'aide

de l'UE – presque aucun d'Europe centrale et orientale (CEE) – ont entraîné une distorsion de concurrence sur le marché commun. Cela est dû principalement à la priorité accordée à la stabilité du secteur financier et de l'euro. Le document fait valoir que les aides d'État pour les banques en faillite peuvent avoir eu des effets positifs importants à court terme, comme la promotion de la stabilité du système bancaire et de l'euro. Toutefois, à long terme, elle a contribué à l'endettement souverain sans précédent en Europe et a contribué à accroître l'instabilité économique et politique de l'UE, en particulier dans son segment d'Europe centrale et orientale le plus vulnérable.

Key words: EU Competition Law; Central and Eastern Europe (CEE); financial crisis; State aid; bank bailouts; Eurozone; sovereign debt; European Stability Mechanism (ESM).

JEL: K21

I. Introduction

The bank bailout cases following the financial crisis of 2008 were subject to prior approval of the European Commission (hereinafter, EC or Commission), the competition authority of the European Union. The Commission was reluctant to reject the rescue efforts directed at failing banks and consistently approved all related requests submitted by EU Member States. Out of the top twenty European banks, the EC ended up authorizing State aid to at least twelve financial institutions (Adamczyk and Windisch, 2015, p. 1).

State aid – the intervention of the State into the market economy – is a matter of a policy decision and is highly controversial because of its short and long term effects on market competition (Adler, Kavanagh and Ugryumov, 2010, p. 66; Lipinsky and Wolters, 2016, p. 193). It is only one of the at least three methods of providing financial assistance to financially distressed corporations, and it involves taxpayer's money. The two alternatives methods include "private money solutions" (where financial aid is provided by private investors, other financial institutions or banks) and "monetary policy solutions" implemented by central banks, which are basically liquidity assistances either in ordinary or in emergency situations[1]. As compared to the pre-crisis years, the role of central banks as "lenders of last resort" has

[1] See Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and

So Close, So Different – Regional Rail Transport in Poland, the Czech Republic and Slovakia

by

Marcin Król[*], Jakub Taczanowski[**]

CONTENTS[***]

Abstract

The objective of this paper is to present three different models of regional railway passenger transport that emerged in the process of post-communist transition after 1989 in neighbouring countries: Poland, the Czech Republic and Slovakia. After an introduction, the second section of the paper shows the historical, spatial and socio-economic context of the analysis. The three resulting models are presented in the following section. This part of the paper is also devoted to the discussion of the developments, experiences and results obtained in Poland, the Czech Republic and Slovakia. The final section provides conclusions.

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Résumé

L'objectif de cet article est de présenter trois modèles différents de transport ferroviaire commun au niveau régional qui sont apparus pendant le processus de transition post-communiste après 1989 dans les pays voisins: la Pologne, la République tchèque et la Slovaquie. Après l'introduction, l'article présente dans la deuxième section un contexte historique, spatial et socio-économique de l'analyse. Les trois modèles différents sont présentés dans la section suivante. Cette partie de l'article est aussi consacrée à la discussion des développements, des expériences et des résultats obtenus en Pologne, en République tchèque et en Slovaquie. La section finale présente des conclusions.

Key words: railway transport; regional transport; public service.

JEL: R40; R50; P50; L92

I. Introduction

Poland, the Czech Republic and Slovakia are neighbouring Central-European countries. They have a common historical, social and cultural identity. As the aftermath of World War II, they fell together into the Soviet sphere of influence[1]. After the historic year of 1989, they simultaneously started post-communist transformation (also referred to as transition) towards capitalism and democracy. Fifteen years later, in 2004, they joined the European Union altogether.

So close to each other and alike, in many areas of the economy they have adopted surprisingly different transformation models. This can be seen very well on the example of regional passenger rail transport systems.

Regional passenger rail transport is a specific segment of the railway system. It meets societal needs for public transport at the lowest – local and regional levels. It has special attributes that have traditionally encouraged government involvement, in Europe and elsewhere. Railway infrastructure, itself, has economic characteristics, mostly related to so-called natural monopoly, that have attracted substantial regulation. Moreover, local railway networks are expensive to build and maintain and yet in regional passenger transport they are served at a relatively low intensity of traffic. This means that such transport services are *per se* non-profitable and would not be supplied without public intervention. In other words, they have the characteristics of public

[1] Until 1993, when they split into two sovereign states, the Czech Republic and Slovakia existed as one country – Czechoslovakia.

NATIONAL LEGISLATION & CASE LAW REVIEWS

Merger Control in Georgia – National Legislation and Case Law Review

by

Solomon Menabdishvili*

CONTENTS

Abstract

Georgia has amended its Law on Competition in 2014 in order to fulfil its obligations set out by the Association Agreement with the European Union. Despite further approximations of its laws with those of the EU, some serious flaws remain. Merging parties are obliged to submit a prior notification to the Competition Agency of Georgia if their total turnover exceeds 20 million Georgian lari (GEL) or if the value of their assets exceeds 10 million GEL (7,692,307 EUR). One of the most interesting aspects of the Georgian merger control system rests in what the Competition Agency is authorised to do in case of a failure to fulfil the notification duty. This paper will discuss Georgian rules on concentrations as well as two of its recent merger cases.

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Résumé

La Géorgie a modifié sa loi sur la concurrence en 2014 afin de remplir ses obligations imposées par l'Accord d'association avec l'Union européenne. Malgré des rapprochements de la loi géorgienne avec la loi de l'Union européenne certains défauts persistent. Les parties de la concentration sont obligées de notifier l'Autorité de la concurrence géorgienne si leur chiffre d'affaires total dépasse 20 millions de lari géorgien (GEL) ou si la valeur de leurs actifs dépasse 10 millions de GEL (7.692.307 EUR). L'un des aspects les plus intéressants du système géorgien de contrôle des concentrations concerne les compétences de l'Autorité de la concurrence en cas de la violation de l'obligation de notification par l'entreprise. Cet article va analyser les règles de la loi géorgienne concernant les concentrations, ainsi que les deux affaires de concentration récentes.

Key words: competition; concentration.

JEL: K21

I. General overview of merger rules

The Parliament of Georgia has adopted a new Law on Competition in 2012 (hereinafter, LC). However, to meet the EU' criteria for signing the Free Trade Agreement, a further approximation of the LC with European competition rules was necessary. The new Georgian Government initiated in 2014 an amendment act, which was adopted on 27 March 2014. In light of these developments, all key domestic competition rules can now be found in the LC of Georgia. However, the LC contains a number of serious flaws which must be rectified as soon as possible. This review will discuss one of them namely Georgia's provisions on merger control.

According to paragraph 1 of Article 11 LC, a concentration includes:

a) merger of two or more independent undertakings resulting in the formation of a single undertaking;
b) gaining of direct or indirect control over an undertaking or its business share through the purchase of securities or interests, or through an agreement or otherwise, by a person already controlling at least one undertaking;
c) participation of one and the same person in the management boards of different undertakings;
d) the establishment of a joint venture, provided that it performs all the functions of an independent undertaking for a long period[1].

[1] See Georgian Law on Competition at: http://competition.ge/en/page2.php?p=4&m=62 (15.07.2016).

Overview of Kazakhstani New Anti-monopoly Regulation

by

Alexander Korobeinikov*

CONTENTS

Abstract

The main statute governing competition in Kazakhstan is the Entrepreneurial Code, first adopted in October 2015. Section 4 of the Code in particular is aimed at the protection of competition in Kazakhstan. It primarily deals with anti-competitive agreements and conduct, provides for a control system over economic concentrations, and regulates anti-monopoly investigations. The anti-monopoly provisions of the Code are enforced by the Committee on the Regulation of Natural Monopolies and Protection of Competition within the Ministry of the National Economy of the Republic of Kazakhstan and its regional departments located in each Kazakhstani region and its two main cities (Almaty and Astana). The

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Committee has a broad range of powers and duties ranging from investigating anti-competitive conduct and imposing administrative sanctions to regulating natural monopolies. The Code generally prohibits horizontal and vertical agreements and concerted actions that lead (or can lead) to restriction of competition, albeit it also provides certain exemptions. The Code includes an exhaustive list of conduct which is prohibited for dominant entities. The Anti-monopoly Committee exercises control over economic concentrations by overseeing mergers, consolidations, acquisitions and certain other transactions.

Résumé

La loi principale régissant la concurrence au Kazakhstan est le Code de l'entreprise, adoptée en octobre 2015. Notamment la section 4 du Code de l'entreprise vise à protéger la concurrence au Kazakhstan. Elle stipule des dispositions concernant des ententes anticoncurrentiels et des pratiques concertées, elle prévoit un système de contrôle des concentrations et réglemente des enquêtes concernant les violations du droit de la concurrence. Les dispositions du Code de l'entreprise concernant la concurrence sont appliquées par le Comité sur la réglementation des monopoles et la protection de la concurrence, au sein du Ministère de l'économie nationale de la République du Kazakhstan et dans ses départements régionaux situés dans chaque région du Kazakhstan et dans ses deux principales villes (Almaty et Astana). Le Comité possède de multiples prérogatives et de fonctions allant de l'examen de comportement anticoncurrentielle et l'imposition de sanctions administratives à la réglementation des monopoles naturels. Le Code interdit généralement les accords horizontaux et verticaux ou les actions concertées qui conduisent (ou peuvent conduire) à la restriction de la concurrence, mais il prévoit aussi certaines exemptions. Le Code contient une liste exhaustive de comportements interdits aux entités dominantes. Le contrôle de concentrations est exercé par le Comité anti monopole et il s'agit de contrôle des fusions, des regroupements, des acquisitions et des certaines autres transactions.

Key words: Kazakhstan; antitrust law; Entrepreneurial Code; anti-competitive agreements; economic concentration; restrictive agreements; dominant market position; unfair competition; violating competition laws.

JEL: K21

A Note on 2015 Developments in Polish Competition Law: Is it Really a Drive Towards the European Model?

by

Anna Piszcz*

CONTENTS

Abstract

Modern Polish competition law has become highly regulated and codified over the twenty five years of its existence and this article will provide readers with information relating to its recent developments of 2015. Separate subsections present a review of provisions on remedies in infringement decisions as well as settlements. A considerable part of this paper is designed to outline the peculiarities that characterize Poland's new provisions on fines. Further on, the paper introduces readers to newest trends in the area of concentration control between undertakings. In addition, an assessment of recent developments and suggestions for a further development of Polish competition law are reviewed in the EU context. The conscious intention of the author is to analyse whether the EU competition law pattern, often regarded as a model for Member States, has been used to develop

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Polish competition law. Has the latter been amended to look more, or less like EU competition law? Has Polish competition law shown the capacity to absorb the best elements of EU competition law into itself? How is the outcome aligned with the declared direction of these amendments?

Résumé

Le droit de la concurrence polonais moderne est devenu très réglementé et codifié au cours des vingt-cinq années de son existence et cet article fournit aux lecteurs des informations relatives à ses développements récents de 2015. Des sous-sections séparées présentent un examen des dispositions concernant les recours dans les décisions d'infraction ainsi que dans la procédure de transaction. Une grande partie partie de cet article vise à présenter les particularités qui caractérisent des nouvelles dispositions de la loi polonaise concernant les sanctions. Ensuite, l'article présente aux lecteurs les tendances les plus récentes dans le domaine du contrôle des concentrations entre entreprises. De plus, une évaluation des développements récents et la proposition des reformes possibles du droit polonais de la concurrence sont examinées dans le contexte de l'Union européenne. L'idée d'auteur est d'analyser si le modèle européen du droit de la concurrence, souvent considéré comme un modèle pour les Etats Membres, a été utilisé pour développer le droit polonais de la concurrence. Est-ce que le droit polonais de la concurrence a été modifié afin de rassembler le droit de l'Union européenne ou non? Est-ce que le droit polonais de la concurrence a démontré sa capacité à intégrer les meilleurs éléments du droit européen de la concurrence? Comment les résultats des modifications de la loi polonaise sur la concurrence correspondent avec les objectifs des changements?

Key words: remedies; settlements; fines; individuals; leniency plus; control of concentrations.

JEL: K21

I. Introduction

Over a quarter of a century has passed since the establishment of the first modern Polish Antimonopoly Act (1990) as well as the creation of the Office for Competition and Consumer Protection – originally called the Antimonopoly Office. For the first time, at least to such an extent, an institutional focus for addressing matters concerning competition policy was provided[1]. The 1990

[1] Under the 1987 Antimonopoly Act, the Finance Minister was responsible for the protection of competition.

2016 Amendment of the Czech Significant Market Power Act of 2009

by

Petr Frischmann, Václav Šmejkal*

CONTENTS

Abstract

The Significant Market Power Act (SMPA) adopted in 2009 regulates the assessment of, and the prevention of, the abuse of market power in the sale of agricultural and food products. The Act generated many controversies from the outset, survived legislative proposals for its abolition, to be finally amended in 2016. However, this kind of legislation failed to solve most of the problems and even managed to create additional controversies. The new amendment formally simplified the actual wording of the SMPA by transposing its numerous earlier

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appendixes, which contained an exemplary list of prohibited forms of SMP abuse, to the actual text of the Act. It also improved transparency and clarity with respect to its earlier vague and ambiguous terminology. At the same time, the amendment seriously modified the scope and principal philosophy of the SMPA by removing the previously required "substantial detriment to economic competition" as the pre-condition of the applicability of the Act. However, since the enforcement of the SMPA falls into the scope of the activities of the Czech Office for Protection of Economic Competition (in Czech *Úřad pro ochranu hospodářské soutěže*, UOHS), the concerns and doubts of the business community continue to grow whether this form of regulation is appropriate after the modification of the concept.

Résumé

La Loi sur les pouvoirs de marchés significatifs («SMPA») adoptée en 2009 réglemente l'évaluation et la prévention de l'abus de pouvoir de marché dans la vente de produits agricoles et alimentaires. Cette loi a provoqué de nombreuses controverses dès le début, a survécu les propositions législatives pour son abolition pour être finalement modifiée en 2016. Cependant, cette législation non seulement n'a pas réussi à résoudre la plupart des problèmes, mais a provoqué des controverses supplémentaires. Le nouvel amendement a simplifié le language du «SMPA» par la transposition de ses nombreuses annexes antérieures, qui ont contenu la liste exemplaire des abus interdites de «SMPA» au texte de la Loi. Il a également amélioré la transparence et la clarté par rapport à la terminologie vague et ambiguë antérieure du «SMPA». En même temps, l'amendement a modifié sérieusement la portée et la philosophie principale du «SMPA» par la suppression de notion de «préjudice substantiel à la concurrence économique» qui a constitué précédemment une condition préalable de l'application de la Loi. Toutefois, vue que l'application du "SMPA" entre dans le cadre des compétences de l'Autorité de la concurrence tchèque (en tchèque: Úřad pro ochranu hospodářské soutěže, UOHS), les préoccupations et les doutes du business si cette réglementation est appropriée après la modification du concept continuent à monter.

Key words: significant market power; retail chains; protection of suppliers; antitrust.

JEL: K23; K42

I. Introduction

The regulation of so-called "buying power" of large retail chains, especially in the agro-food sector, has been a topic of lively debate in the Czech Republic both in the political and legal-theory field for quite a long time now. Discussions on the need for some regulation of retail chains began before the

Review of the New Polish Model of Abstract Control of Standard Forms of Agreements Concluded with Consumers

by

Paulina Korycińska-Rządca*

CONTENTS

Abstract

The Polish Act of 5 August 2015 amending the Act on Competition and Consumer Protection and certain other acts introduced several changes intended to strengthen consumer protection. Its substantial part concerns the abstract control of standard forms of agreements concluded with consumers. The Amendment Act of 2015 has completely changed the previous model of abstract control of standard forms of

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agreements concluded with consumers by replacing the court proceedings model with the administrative proceedings model. This article presents an analysis of Polish legal rules on the abstract control of standard forms of agreements concluded with consumers as amended by the Amendment Act of 2015. Its purpose is to verify whether the new Polish model may be deemed as an appropriate and effective means of preventing the continued use of unfair terms, within the meaning of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. The paper analyses the legal rules on the new model of abstract control of standard forms of agreements concluded with consumers (the administrative proceedings model) and compares the new model with its predecessor (the court proceedings model). The paper does not cover the remaining changes introduced into the Polish Competition Act of 2007 by the Amendment Act of 2015, which are not connected to abstract control of standard forms of agreements concluded with consumers.

Résumé

La loi polonaise du 5 août 2015 modifiant la loi sur la concurrence et la protection des consommateurs et certains d'autres actes a introduit plusieurs modifications qui ont eu pour leur objectif de renforcer la protection des consommateurs. Sa partie substantielle concerne le contrôle abstrait des formulaires types des contrats conclus avec des consommateurs. La loi de 2015 a complètement modifié le modèle antérieur de contrôle abstrait des formulaires types des contrats conclus avec des consommateurs en remplaçant le modèle judiciaire par le modèle administratif. Cet article présente une analyse des règles juridiques polonaises relatives au contrôle abstrait des formulaires types des contrats conclus avec des consommateurs introduits par la loi de 2015. Son objectif est de vérifier si le nouveau modèle polonais peut être considéré comme un moyen approprié et efficace pour empêcher l'application des clauses abusives dans les contrats, au sens de la directive du Conseil n° 93/13/CEE du 5 avril 1993 relative aux clauses abusives dans les contrats conclus avec les consommateurs.
L'article analyse des règles juridiques du nouveau modèle de contrôle abstrait des formulaires types des contrats conclus avec des consommateurs (le modèle de la procédure administrative) et compare le nouveau modèle avec son prédécesseur (le modèle de la procédure judiciaire). L'article ne se réfère pas aux autres modifications introduites par l'amendement de 2015 dans la loi polonaise sur la concurrence de 2007, n'étant pas liées au contrôle abstrait des formulaires types des contrats conclus avec des consommateurs.

Key words: consumer protection; abusive clauses; register of abusive clauses; standard forms of agreements; proceedings in the cases for classification of contractual provisions found in standard forms of agreement provisions as abusive clauses.

JEL: K12; K20; K23

I. Introduction

The Polish Act on Competition and Consumer Protection was adopted in 2007[1] and came into force on 21 April 2007. It regulates both competition and consumer protection issues. In 2014, the Polish legislature decided to adopt the Amendment Act of 2014[2] designed to strengthen competition protection[3]. The changes covered by this Amendment Act relate to, in particular, the enforcement of the prohibition of anti-competitive practices and merger control proceedings (see the critical analysis of the changes introduced by the Amendment Act of 2014: Skoczny, 2015, p. 165-183; Piszcz, 2016).

Shortly after the Amendment Act of 2014 came into force on 31 March 2015, a pre-consultation meeting was organized, the purpose of which was to discuss the scope of the planned changes in the Competition Act in the field of consumer protection. The draft of the Amendment Act was sent for inter-ministerial consultations and public consultation on 15 April 2015. As it was indicated in the explanatory notes accompanying the draft Amendment Act of 2015, competition and consumer protection issues are strongly linked. After competition protection was strengthened by the adoption of the Amendment Act of 2014, it was, therefore, also necessary to adopt changes in the field of consumer protection[4].

Hence, the Act of 5 August 2015 amending the Act on Competition and Consumer Protection and certain other acts[5] introduced several changes mainly connected to the consumer protection area. A substantial part of this Act concerns abstract control of standard forms of agreements concluded with consumers. It replaces the earlier "court proceedings model" with an "administrative proceedings model". Those are not, however, the only changes introduced by the Amendment Act of 2015. The remaining changes concern,

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[1] The Act of 16.02.2007 on the Competition and Consumers Protection (consolidated text: Journal of Laws 2015, item 184 as amended); available in English at http://www.UOKiK.gov.pl/competition_protection.php (23.07.2016). Hereinafter, Competition Act.

[2] The Act of 10.06.2014 amending the Act on Competition and Consumers Protection and the Code of Civil Procedure (Journal of Laws 2014, item 945); unavailable in English. Hereinafter, the Amendment Act of 2014.

[3] Explanatory notes accompanying the draft of Act amending the Act on Competition and Consumers Protection and the Code of Civil Procedure, p. 1; available at http://www.sejm.gov.pl/Sejm7.nsf/PrzebiegProc.xsp?nr=1703 (23.07.2016); unavailable in English.

[4] Explanatory notes accompanying the draft of Act amending the Act on Competition and Consumer Protection and certain other acts, p. 1; available at http://www.sejm.gov.pl/Sejm7.nsf/PrzebiegProc.xsp?nr=3662 (23.07.2016); unavailable in English.

[5] Journal of Laws 2015, item 1634; unavailable in English. Hereinafter, the Amendment Act of 2015.

C A S E C O M M E N T S

What Role for EU Competition Law in Regulated Industries? Reflections on the Judgment of the General Court of 17 December 2015 *Orange Polska v European Commission* (Case T-486/11)

by

Sandra Marco Colino*

CONTENTS

Key words: antitrust; competition law; sector-specific regulation; network industries; refusal to supply; essential facilities.

JEL: K20; K21; K22; K23

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I. Introduction

On 17th December 2015, the General Court of the European Union (GC) confirmed a fine of over EUR 127 million imposed by the European Commission (hereinafter the Commission) on the Polish telecommunications company Orange Polska (hereinafter OP), formerly known as Telekomunikacja Polska[1]. According to the fining decision, issued in 2011 (hereinafter the Commission decision), OP abused its dominant position by refusing access to its wholesale broadband services to new entrants, acting in contravention of Article 102 of the Treaty on the Functioning of the European Union (TFEU)[2].

Abuse of dominance is a particularly convoluted area of competition law. The long-awaited judgments of the GC in *Intel*[3] and of the Court of Justice in *Post Danmark II*[4], handed down shortly before the *Orange Polska* ruling, have absorbed the attention of antitrust experts, and the ongoing Google investigation is the *cause célèbre* of the moment. In such an unsettled context, the case against the Polish incumbent has gone somewhat by the wayside. Yet the GC's endorsement of the Commission decision is not without significant implications for the treatment of constructive refusals to supply in network industries. By confirming the imposition of one of the most substantial financial penalties ever levied on a broadband Internet service provider, the European courts have once again given their blessing to the Commission's activism in the liberalization of telecommunications markets (de Streel, 2014). Interestingly, by the time OP was punished, the infringement had allegedly come to an end following the intervention of the national regulatory authority (hereinafter NRA). The decision thus fanned the flames of the debate, particularly fervent among Polish scholars, as to whether competition law should intervene where there is sector-specific regulation.

The argument that the action of the relevant NRAs should be prioritised over the application of competition law by the national competition authorities (NCAs) and the Commission in regulated industries (Stawicki, 2011) finds support in the prevailing view in the United States (US) that treats regulation and antitrust as antonyms (Maggiolino, 2015; Díez, 2015)[5]. Such a position has been somewhat fuelled by the relatively inconsistent case law of the Polish Supreme Court, which has appeared to suggest that incumbent operators

[1] Case T-486/11 *Orange Polska S.A. v European Commission* 17 December 2015 (nyr), hereinafter GC ruling.

[2] Commission decision of 22 June 2011, COMP/39.325 – *Telekomunikacja Polska*.

[3] Case T-286/09 *Intel v Commission*, EU:T:2014:472.

[4] Case C-23/14 *Post Danmark A/S v Konkurrencerådet,* EU:C:2015:651.

[5] Case *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko* 540 U.S. 398 (2004).

Guidance on the Limits for the Use of Restrictive Clauses in Commercial Lease Agreements – Once Again on Restrictions "by Object". Case Comment to the Preliminary Ruling of the Court of Justice of 26 November 2015 *SIA 'Maxima Latvija' v Konkurences padome* (Case C-345/14)

by

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CONTENTS

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Key words: anti-competitive agreement; non-compete clause; vertical restriction; Article 101 TFEU; by object; by effect; market foreclosure; commercial lease agreement; shopping centres; analogous national legislation; Latvia.

JEL: K21; K42

I. Preliminary summary

The Court of Justice (hereinafter, CJ or Court) held in case C-345/14 *SIA 'Maxima Latvija' v Konkurences padome* that the inclusion of a clause that allows a tenant to indirectly select a neighbour of adjoining shopping centre spaces is not a restriction "by object". On the example of Maxima Latvija (a supermarket chain active predominantly in the food sector), the CJ outlined under which conditions can competition law concerns arise from non-compete clauses in lease agreements concerning shop premises. The existence of a right to veto over potential tenants of adjourning shop premises may have the effect of restricting competition within the meaning of Article 101(1) TFEU, and should thus be assessed according to its market impact. Although the Court recognised that a unilateral decision on the lease of other commercial spaces is not by its nature anti-competitive, an effect-based assessment would require a multi-faceted analysis, which might still find a competition law infringement. Although the multi-criteria analysis proposed by the CJ is somewhat blurry, the judgment is a valuable contribution to the debate on the restrictive interpretation of "by object" restrictions.

What certainly emerged from the CJ's standpoint in *Maxima Latvija* is a clarification of the "object" criterion, which has for some time now been in a state of flux. On the one hand, *Maxima Latvija* acts as a reminder to be well aware of contractual non-compete arrangements. On the other, the judgment provides comments on legal framework of vital character. However, while the remarks of the Court are meaningful, they remain vague. Nevertheless, as things stand, the CJ emphasised that the approach towards object restrictions cannot be too simplistic. The *Maxima Latvija* judgment offers a reliable approach whereby the judiciary should examine the context of each case before them, identify the type of arrangements in place, and check whether the behaviour is really "bad". Although the content of the judgment does not provide much detail on why the potential harm contained in the scrutinised lease agreements (or more precisely, in the contested clause introduced into them) was ruled as not harmful enough, the fact has to be welcomed that the Court then looked at the clause's effects. This is obviously also good news for undertakings active in shopping malls. However, the approach taken in the

should take a narrow view of what kind of agreements can be considered antitrust violations "by object". There could be no clear-cut "by object" infringement, as has been argued, for instance, in the pay-TV broadcaster example. As emphasised by J. Owen Forrester, "labelling" conduct as a "by object" infringement "*can free regulators and judges from making further inquiry into the reality of what is happening*"[22].

It seems that the debate over "by object" and "by effect" will continue. Thus, it will be a tall order not even to formulate a brief clause, but to make sure that the test of *Maxima Latvija* case law would not appeal. This certainly leaves the door wide open for brave companies which are not afraid to take a risk of potential consequences of such contractual arrangements, or simply have the time and the resources to conduct the three-tier analysis beforehand.

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Antitrust Liability in the Context of Online Platforms. Case Comment to the Preliminary Ruling of the Court of Justice of 21 January 2016 *'Eturas' UAB v Lietuvos Respublikos konkurencijos taryba* (Case C-74/14)

by

Bartosz Targański*

CONTENTS

Key words: antitrust; coordination; e-commerce; online platforms; compliance.

JEL: L410; L810

I. Introduction

In its judgment of 21 January 2016 in Case C-74/14 (hereinafter, judgment), the Court of Justice (hereinafter, CJ) responded to a preliminary question submitted by the Supreme Administrative Court of Lithuania. The latter

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asked whether the mere dispatch of an email relating to the maximum level of rebates may constitute sufficient evidence to establish that its addressees can be found liable for illegal concerted practices within the meaning of Article 101(1) TFEU. The CJ judgment raises novel issues specific to antitrust enforcement in e-commerce in two areas: (i) can users of a third party online booking platform be found liable for an anti-competitive practice purely on the basis of receiving unprompted email messages, even if they were not aware of their content, and (ii) what steps should they take in order to distance themselves from anti-competitive actions in an e-commerce environment.

II. Legal background

In a decision of 7 June 2012, the Lithuanian Competition Council (hereinafter, Council) found that 30 travel agencies as well as the administrator of the online booking system E-TURAS violated Article 101(1) TFEU and its national equivalent Article 5 of the Lithuanian Competition Act. The infringement took the form of the coordination of the level of discounts available on bookings made via the E-TURAS system between 27 August 2009 and the end of March 2010. The proceedings were instigated by a leniency application submitted by one of the travel agencies. On 8 April 2013, the Vilnius District Administrative Court upheld the decision in part but reduced the fines imposed. The case was subsequently appealed to the Supreme Administrative Court of Lithuania, which then asked the CJ for a preliminary ruling under Article 267 TFEU. Advocate General Szpunar delivered his Opinion on the case at hand on 16 July 2015. Following the CJ judgment, the Supreme Administrative Court of Lithuania ultimately upheld the decision of the Council on 3 May 2016.

III. Online booking system

E-TURAS is an online travel booking system that allows travel agencies to offer travel bookings for sale on their websites through a uniform presentation method determined by the administrator, who holds exclusive rights to the system. Each travel agency had a mailbox within the System in order to communicate with the administrator. On 25 August 2009, the administrator of the System sent an e-mail to several travel agencies through the internal messaging system, the email was named *Vote*. In that email, the administrator

Evaluation of Pre-accession State Aid in the Energy Sector. Case Comment to the Judgment of the Court of Justice of 1 October 2015 *Electrabel SA, Dunamenti Erőmű Zrt. v European Commission* (Case C-357/14 P)

by

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Key words: power purchase agreements; pre-accession state aid; recovery of unlawful state aid; energy market; concept of an undertaking; MEIP test – lack of advantage; ICSID procedure; Energy Charter Treaty.

JEL: K23; K32; K41

I. Introduction

The European Commission decided in 2008 that Hungary provided State aid through a set of Power Purchase Agreements[1]. Electrabel SA (hereinafter, Electrabel) and Dunamenti Erőmű Zrt. (hereinafter, Dunamenti Erőmű) brought an action for annulment against this decision that was dismissed by the General Court in 2014[2]. One year later, the Court of Justice confirmed the first instance ruling, even though Advocate General Wathelet was of the opinion that the contested judgment should be set aside.

According to the Advocate General (hereinafter, AG), the case raised three difficult issues: (i) is the relevant date for the assessment of the existence of the aid the date on which the measure was implemented (well before Hungary's EU accession) or the date of the accession; (ii) should the date of accession be the relevant date, do facts prior to that date have to be included in the assessment of the existence of State aid, and (iii) which company should repay the aid granted[3].

II. The background of the case: the privatization of the Hungarian electricity sector

Dunamenti Erőmű is a Hungarian electricity generator which operates a power plant in the proximity to Budapest. As a former public undertaking, the company was privatized in 1995. Electrabel SA (part of the GDF Suez group) became its majority owner; Magyar Villamos Művek Zrt. (hereinafter, MVM), now the key Hungarian public undertaking in the electricity sector, owned 25% of its shares.

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[1] NN 49/2005, Brussels, 2008.VI.04 C (2008) 2223 final, available at: http://ec.europa.eu/competition/state_aid/cases/201965/201965_827719_388_1.pdf (20.07.2016).

[2] Case T-179/09 *Dunamenti Erőmű v Commission*, ECLI:EU:T:2014:236.

[3] Case C-390/98 *H.J. Banks & Co. Ltd v The Coal Authority and Secretary of State for Trade and Industry*, ECLI:EU:C:2001:456, and C-277/00 *Germany v Commission*, ECLI:EU:C:2004:238.

From a procedural point of view, it was also interesting to realize the limits of the wide concept of an undertaking. A company that was not a party in the first instance judicial procedure was not allowed to appeal the GC's judgment even if, at the time when the case was registered, it formed an economic unit with the undertaking to which the Commission's decision was addressed.

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B O O K S R E V I E W S

Piotr Semeniuk,
Koncepcja jednego organizmu gospodarczego w prawie ochrony konkurencji [*The Concept of a Single Economic Unit in Competition Law*],
University of Warsaw Faculty of Management Press,
Warsaw 2015, 325 p.

The book under review here provides a very broad analysis of the concept of a single economic unit. The analysis refers either to many aspects of substantive rules of competition law (among them, the application of the prohibition of competition restricting agreements to agency contracts or bid-riggings, merger control, setting up of joint ventures) or to the complex problem of attributing liability for antitrust breaches and imposing sanctions for them. [why is it either or?] The Author tries to compare the application of the concept of a single economic unit in competition law and its application in other legal areas such as energy law or regulations on public procurements. The economic context is not omitted either, which must be presented due to the nature (economic as such) of the analyzed concept, economic issues are thus covered in subchapter II.3. As a result, the reviewed book presents the concept of a single economic unit in a complex legal and economic context.

The very wide scope of this publication is fully reflected in its structure – the book contains 9 chapters. Chapter I introduces the key problems covered by the Author. Chapter II presents the concept of a single economic unit from the perspective of jurisprudence and economics. Chapter III focuses on the concept of a single economic unit in merger control. Chapter IV explores the single economic unit in the context of joint ventures. In chapter V, the Author presents the relative dimension of the concept of a single economic unit with a nexus to the status of an agent and an employee. Chapter VI covers the formal aspect of the concept of a single economic unit, which is attributing antitrust liability to a particular entrepreneur being a part of an economic unit or to a unit as a whole. Chapter VII introduces problems associated with the substantive aspect of the concept of a single economic unit and clearly focuses on applying this concept to bid-riggings. In chapter VIII, the Author provides a comparison of the concept of a single economic unit and neighbouring institutions

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the quality of the book is also worth appreciating. Concepts of the inclusive and exclusive dimension of the single economic unit doctrines should somehow be incorporated by Polish jurisprudence contributing to the development of antitrust law in Poland[1].

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[1] A reference to Poland is done solely because of the fact that book – published in Polish – is accessible mainly for Polish researchers.

R E P O R T S

The Pursuit Before Polish Courts of Actions for Damages Based on Competition Law Infringements. Warsaw, 20 April 2016

The Conference entitled "The pursuit before Polish courts of actions for damages based on competition law infringements" ("*Dochodzenie przed sądem polskim roszczeń odszkodowawczych z tytułu naruszenia reguł konkurencji*") took place in Warsaw on 20th April 2016. It was organized by the Centre for Antitrust and Regulatory Studies (CARS, University of Warsaw). The Conference was dedicated to issues connected to the implementation into the Polish legal order of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (hereinafter, Damages Directive).

Professor Stanisław Piątek (Faculty of Management, University of Warsaw) opened the conference on behalf of Professor Tadeusz Skoczny (CARS Director), welcomed the participants and briefly described outline of the conference. He then informed the audience that the conference would be preceded by the Great Owl Award Ceremony – the Great Owl is an Honorary Award granted by CARS for overall achievements in the field of law and economics of competition. In 2016, the jury decided to award the Great Owl to Professor Stanisław Sołtysiński (of counsel at Sołtysiński Kawecki & Szlęzak – Kancelaria Radców Prawnych i Adwokatów Spółka komandytowa, Poland). As a member of the Great Owl jury, Professor Marek Szydło (Faculty of Law, Administration and Economics of the University of Wrocław, Poland) spoke next of the many reasons for awarding the Great Owl to Professor Sołtysiński, emphasizing his great scientific achievements in the competition law field. Professor Anna Fornalczyk (the first President of the Polish Anti-Monopoly Office) stressed next that Professor Sołtysiński exercised a major impact on the competition law application practice in Poland and proceeded to present Professor Sołtysiński with the Great Owl Award. Professor Sołtysiński thanked for the award and briefly described his role in the negotiations of the Polish EU accession treaty and his beginnings with competition law.

As Professor Piątek stated during the opening speech, the conference was convened to discuss issues referred to in the monograph "The pursuit before Polish courts of actions for damages based on competition law infringements" edited by Professor

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Anna Piszcz (Faculty of Law of the University of Białystok, Poland) and Dr Dominik Wolski (in-house lawyer in Jeronimo Martins, Katowice Scholl of Economics, Poland) published by CARS.

The first session of the conference was moderated by Professor Sołtysiński; it was devoted to substantive law aspects of private competition law enforcement.

Dr Dominik Wolski (in-house lawyer in Jeronimo Martins, Katowice Scholl of Economics, Poland) delivered the first paper dedicated to key issues connected to the implementation of the Damages Directive into the Polish legal order. Speaking about principles of liability for damages arising from competition law infringements, he emphasized that there is a need to ensure consistency between the principles of private and public competition law enforcement. He stated that the introduction of "special" liability for claims arising from competition law breaches would not be justified. In particular, it would not be recommended to introduce objective illegality. He also indicated that pursuing claims by persons indirectly injured was controversial. However, if there was a rule of law that would expressly enable persons indirectly injured to claim damages, any doubts in this matter should be waived. Dr Wolski stated also that there are objections as to the moment from which the injured person may claim interests. According to the Damages Directive, interests should be due from the moment when the harm occurred until the time when compensation is paid. He indicated that the Damages Directive is clear in this context but such solution may be contrary to the principle of justice. In case of damages claimed on a legal basis other than competition law infringements, interests are, as a rule, due after the summons for payment. The speaker mentioned that the definition of overcharges would probably not solve the problems with the quantification of harm. As to the role of a competition authority in the process of the quantification of harm, he stated that the authority should not be the one that quantifies it – its role should be limited to helping in this process as the courts may not have enough knowledge to quantify the harm properly.

Professor Paweł Podrecki (Faculty of Law and Administration of the Jagiellonian University in Kraków, Poland) and Katarzyna Wiese (The Traple Konarski Podrecki & Wspólnicy Law Firm, Poland) presented jointly a paper on joint liability of competition law infringers and focused on its limitations. Professor Podrecki briefly explained the elements of joint and several liability and stated that the basic function of compensation was to compensate the damage. The full compensation rule means that the injured person cannot claim compensation exceeding the amount of the damage. However, there is a problem here with legal rules on interests due from the moment when the harm occurred. The speaker stated also that the limitations of joint liability of SMEs as well as that of recipients of immunity from competition law fines (leniency) might cause practical problems in claiming damages. Those limitations lead to a modification of the general liability principle, because if one of the severally liable entities is either a SME or benefits from leniency, other severally liable entities will not be able to recover an appropriate contribution from them. Katarzyna Wiese discussed subsequently issues connected to the limitations of joint liability of SMEs and immunity recipients focusing in particular on the conditions that SMEs have to fulfil in order to limit their liability.

Aleksander Stawicki (Senior Partner at WKB Wierciński, Kwieciński, Baehr law firm, Poland) delivered a paper – prepared jointly with Dr Bartosz Turno (WKB Wierciński, Kwieciński, Baehr law firm, Poland) – on the limitation periods in competition law enforcement. Mr Stawicki briefly mentioned basic provisions on limitation periods. He stated that in Dr Turno's and his own opinion, one may be sure that there was an infringement once a decision issued by the President of the Office of Competition and Consumer Protection (UOKiK – the Polish National Competition Authority, NCA) becomes final. The speaker indicated that the proceeding initiated by the UOKiK President or before the Court of Competition and Consumer Protection would not interrupt the running of the limitation period. He also emphasized that the limitation period will not start until the infringement ceased. In this scope, there may be a practical problem with establishing when the infringement has ceased. In his opinion, the introduction of the five-year minimal limitation period provided by the Damages Directive was sufficient, albeit the Polish legislator should also introduce a second limitation period, the course of which would not depend on the damaged entity's knowledge of the infringement. He proposed that the second limitation period could last ten years from the date of the act which caused the harm, or from the date when the infringement ceased. In his opinion, the introduction of such second limitation period – despite the fact that it has not been covered by the Damages Directive – will not be contrary to the Damages Directive.

The first conference session closed after a discussion focusing in particular on the issue of the quantification of harm, including the cooperation between the UOKiK President and national judiciary with respect to this matter.

The second session was chaired by Katarzyna Lis-Zarrias (judge, Ministry of Justice, Poland); it was dedicated to procedural issues of competition law enforcement.

Professor Agata Jurkowska-Gomułka (Higher School of Information Technology and Management in Rzeszów) presented the first paper in this session speaking about public and private enforcement of competition law in the EU and in Poland. She first indicated that the European model of competition law enforcement is seen as a public model rather than a private one and that the Damages Directive reflects what had already been mentioned in the jurisprudence. She also emphasized that the model of private enforcement, introduced in the Damages Directive and in the act that will implement this Directive into the Polish legal order, is not likely to have an impact on the development of private competition law enforcement. Professor Jurkowska-Gomułka noted that the reason for this does not arise from the Damages Directive stating that the European model of competition law enforcement is built mainly as public competition law enforcement. She also indicated that the number of cartels is not that great in Poland.

Maciej Gac (Jagiellonian University in Kraków, Poland) covered in his speech the issue of disclosure of evidence of competition law infringements. He emphasized that in Poland the mechanism of gaining evidences from the opposing party rests currently in Article 248 of the Civil Procedure Code. However, the existing legal provision could prove insufficient in private competition law enforcement. The procedure of disclosure of evidence is not yet known in Poland and so it is necessary to introduce the procedure

of the disclosure of evidence as described in Article 5 of the Damages Directive. In his opinion, the limitations on the disclosure of evidence included in the files of a competition authority is one of the key issues regarding the disclosure of evidence.

Professor Anna Piszcz delivered the next paper on the effects of a domestic infringement decision. She indicated that the Damages Directive has introduced two types of effects of a domestic infringement decision: a cross-border effect (Article 9(1) of the Damages Directive) and a non-cross-border effect (Article 9(2) of the Damages Directive). She emphasized that Article 9(1) of the Damages Directive should be implemented by the introduction into the Polish legal order of an irrefutable legal assumption. This would mean that for the purpose of a damages claim on the basis of Articles 101 or 102 TFEU and equivalent national provisions, it would be assumed that a competition law infringement had taken place if it was so declared in a prior final decision of the NCA or the reviewing court of that EU Member State. It is crucial to expressly indicate that evidence to the contrary is not permitted. As to the implementation of Article 9(2) of the Damages Directive, she proposed that the Polish legislator should introduce a refutable legal assumption. This would mean that for the purpose of a damages claim on the basis of Articles 101 or 102 TFEU and equivalent national provisions, it would be assumed that a competition law infringement had taken place if it was so declared in a prior final decision of a NCA or reviewing court from another EU Member State. However, it should be possible to attempt to disprove this legal assumption.

Małgorzata Modzelewska de Raad (Modzelewska & Paśnik law firm) presented a paper on consensual resolution of disputes resulting from competition law violations. In her opinion, it is commendable that the Damages Directive also covers the issue of the effects of consensual settlements on subsequent actions for damages. She emphasized that public administration bodies are not involved in consensual resolution of disputes. The manner of solving those disputes depends on general legal culture, since alternative dispute resolution requires the consent of the parties of the dispute. The speaker indicated that a given arbitration court should apply public competition law and stated that a decision issued by a competition authority becomes a part of the legal order. Therefore, the arbitration court should not make its own assessment as to the infringement if there was a prior final decision of a competition authority declaring that a competition law violation had indeed taken place. She indicated that arbitration courts are more predestined to quantify the harm than common courts.

The second session closed after a discussion focusing in particular on the effects of consensual settlements on subsequent actions for damages and the limitations of liability for immunity recipients.

The conference was briefly summarised by Professor Piszcz and Dr Wolski. Subsequently, Professor Piątek thanked the participants and closed the conference on behalf of Professor Tadeusz Skoczny and CARS.

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Third National Conference: Consumer in the Rail Passenger Market. Łódź, 25 May 2016

The Third National Conference entitled "Consumer in the rail passenger market" was held on 25th May 2016 at the Faculty of Law and Administration of the University of Łódź. The event was organised for the third time by the Polish Foundation of Competition Law and Sector Regulation *Ius Publicum* and the Student Society of Energy Law and Infrastructural Sectors of the University of Łódź. The organising committee was joined for the first time by the Department of European Economic Law of the University of Łódź, the Department of Public Economic Law of the University of Łódź, and the Office of the Łódź Voivodeship. The Conference was held under the patronage of the President of the Office of Rail Transport (in Polish: *Urząd Transportu Kolejowego,* hereinafter, UTK), the Centre of Antitrust and Regulatory Studies (CARS, University of Warsaw) and the Railway Business Forum. PKP S.A acted as the Golden Partner of the conference, the Institute for Economic Law Sp. z o.o. as its Silver Partner, and Łódź Agglomeration Railway Sp. z o.o. as its Bronze Partner. A number of other bodies gave their support to the conference including: the Centre for Public Procurement and Public-Private Partnership of the University of Łódź, Pawełczyk & Szura Law Office, Wierzbicki Adwokaci i Radcowie Prawni Law Office, the Student Council of the Faculty of Law and Administration of the University of Łódź, the Scientific Association of Law Students of the Maria Skłodowska-Curie University of Lublin, the Scientific Group of Administrative Law at the Silesia University, and the Student Society of Energy Law and Sector Regulation of the Adam Mickiewicz University of Poznań.

The event was the continuation of the first and second edition of the "Consumer in the rail passenger market" conferences held on 10th May 2014 (in Katowice)[1] and 18th March 2015 (in Łódź)[2] respectively.

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[1] Kraśniewski, M. (2014). Sprawozdanie z ogólnopolskiej konferencji naukowej pn. „Konsument na rynku kolejowych przewozów pasażerskich", Katowice, 10 marca 2014 r. *iKAR, 7*(3), 133–135.

[2] Kraśniewski, M. and Ziarkowski, M. (2015). Sprawozdanie z II Ogólnopolskiej Konferencji Naukowej pn. Konsument na rynku kolejowych przewozów pasażerskich Łódź, 18 marca 2015 r. *iKAR, 4*(4), 159–163.

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Administration, University of Warsaw) presented the jurisprudence of the CJEU on access to railway infrastructure. Katarzyna Surmiak (student, Faculty of Law and Administration, University of Silesia in Katowice) spoke of activities and expertises of the President of UTK in the area of railway infrastructure. The session ended with a speech by Tomasz Mizioch (student, Faculty of Law and Administration, University of Silesia in Katowice) entitled "An administrative law analysis of a decision of the President of UTK replacing a contract for access to railway infrastructure".

The conference ended with speeches given by Professor Królikowska-Olczak and Professor Pawełczyk. During the closing ceremony they announced the organization of the next edition of the conference, which will take place in March 2017 in Łódź. They also announced the publication of a book containing a selection of papers concerning the regulation and protection of consumer rights in the railway sector. The planned publication will be the continuation of the speeches presented during the Third National Law Conference "The consumer in the passenger rail transport market".

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4th Polish-Portuguese PhD Students' Conference on Competition Law. Białystok, 10 June 2016

The 4th Polish-Portuguese PhD Students' Conference took place on 10 July 2016 in Białystok, Poland. The conference focused primarily on competition law issues in Portugal and Poland. It was organized by the Department of Public Economic Law at the Law Faculty of the University of Białystok. The conference was the result of on-going fruitful cooperation between the latter and the Católica Porto Law School, Catholic University of Portugal. The international character of the conference provided an excellent opportunity for Portuguese and Polish PhD students to exchange opinions on issues related to competition law in particular.

Professor Anna Piszcz (University of Białystok) opened the conference and welcomed a number of guests including: Professor Manuel Fontaine Campos (Católica Porto Law School), Professor Dusan V. Popovic (Faculty of Law, University of Belgrade), Professor Aleksander Werner (Warsaw School of Economics) and Professor Daniel D. Barnhizer (College of Law, Michigan State University). Professor Piszcz presented subsequently the assumptions and scope of the conference.

The first session was chaired by Professor Piszcz. Professor Manuel Fontaine Campos took the floor first with a presentation entitled "The regulation of state aid according to the Portuguese Competition Act". His speech centred on finding an answer to the question: what could/should be the role of National Competition Authorities (hereinafter, NCA) regarding state aid control? The speaker analysed the international trade and the economic rationale of state aid. The speaker also explained the rationale of supranational state aid and presented the scope of the control exercised by the European Commission in this regard. The last part of his presentation devoted to the role and powers of the Portuguese Competition Authority.

Professor Dusan V. Popovic spoke next presenting a paper entitled "Control of state aid from the perspective of an EU candidate country". He started his speech by comparing legislative frameworks referring to state aid control entrusted to a NCA in Western Balkans. Professor Popovic also made a comparison between provisions and legal frameworks that existed in the pre-accession period in Central and Eastern European Countries. In the last part of the presentation, the speaker indicated a vague

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of the proceedings, referring to procedural issues, the setting of fines as well as judicial review of the NCA's decisions. The speaker emphasized the importance of the authority's role in enforcing the Portuguese Competition Act.

Magdalena Knapp (University of Białystok) discussed subsequently the concept of abuse of superior bargaining power in a presentation entitled "Protection against the abuse of superior bargaining position". She addressed therein the problem of exploitative behaviour of one party which imposes unjust terms and conditions on a weaker contractual party. She analysed different legislative measures implement by states in order to address issues relating to abusive conduct of stronger contracting parties. The speaker presented a number of shortcomings present in existing regulations and incentives to introduce specific provisions on abuse of superior bargaining position.

The next part of the conference consisted of conclusions and a summary of the session devoted to the presentations made by PhD students. The conference allowed for the exchange and analysis of international experiences on competition law issues. The next meeting, to be held on 14 October 2016 in Białystok, is now eagerly awaited. It will focus on private enforcement of competition law and combating unfair competition.

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Special Report on the Centre for Business Law and Practice, University of Leeds

The Centre for Business Law and Practice is a leading research centre based at the University of Leeds in the United Kingdom. Bringing together over twenty experienced academics (almost half of which are full professors), this well-established centre has research expertise in a number of areas, including corporate and financial law, commercial and consumer law and, importantly, competition/antitrust law. The Centre, led by Professor Gerry McCormack, conducts doctrinal, theoretical and empirical research within its research areas. It disseminates its research outputs as widely as possible by publishing monographs, articles, and reports. It also hosts regular seminars and high profile conferences which engage with both the academic community, the legal profession, policy-makers and regulators. It has a large and diverse community of PhD students, who are supported by an annual PhD student conference and a 'brown bag' lunch seminar series at which they can present their own research.

Recently the Centre has taken active steps to develop its competition law expertise. In particular, in October 2013 both **Professor Pinar Akman** and **Associate Professor Peter Whelan** took up positions at the School of Law, with Professor Akman becoming the Deputy Director of the Centre (until September 2015).

Professor Akman has published her research in both renowned specialist competition law journals and generalist law journals and is the author of the research monograph *The Concept of Abuse in EU Competition Law: Law and Economic Approaches* (Hart Publishing, 2012). She has been involved in many externally funded research projects and was one of the eight investigators who applied for the second five-year funding of the ESRC Centre for Competition Policy in 2009 which obtained over £4 million. Some of the other work she has undertaken has been commissioned by, for example, the UK Department of Business, Enterprise and Regulatory Reform, energywatch and the Irish Competition Authority. In 2015/16, Professor Akman provided consultancy to Google, Inc on the European Commission's competition law investigation into Google's practices in Europe. She is a Non-Governmental Advisor (NGA) to the International Competition Network's (ICN) Unilateral Conduct Working Group for the UK and the Cartels Working Group for Turkey. Professor Akman is qualified to practice in Turkey.

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and regulation; the Digital Single Market; private international law and competition law; the employment of imprisonment as a method of enforcing competition/antitrust law; all aspects of competition law enforcement; and international cooperation in competition law. The competition law team at Leeds is interested in developing research projects with international partners in those particular areas of competition law scholarship.

Examples of the recent competition law outputs of the Centre include: Akman, 'A Competition Law Assessment of Platform Most-Favoured-Customer Clauses' (2016) Journal of Competition Law and Economics, forthcoming; Danov, 'Global Competition Law Framework: A Private International Law Solution Needed' (2016) 12(1) Journal of Private International Law 77; Stylianou, 'Systemic Efficiencies in Competition Law: Evidence from the ICT Industry' (2016) 12(3) Journal of Competition Law and Economics 557; and Whelan, 'Beyond the Theoretical: Articulating Enforcement Strategies for Successful European Antitrust Criminalization' (2016) 81 Antitrust Law Journal, forthcoming.

The competition law team at the Centre organise an annual conference (in Leeds) on competition law. The first conference was held on 15 May 2015 and was entitled 'Contemporary Challenges in Competition Law'. It considered some of the cutting-edge, most difficult topics of competition law and its enforcement. These are issues that competition law and economics, as they stand, struggle to resolve. The keynote speech was delivered by Lord David Currie, Chairman of the Competition and Markets Authority. The second, and most recent, conference was entitled 'Competition and Regulation in Digital Markets' and was held on 9 September 2016. It brought together in a series of panels academics, industry representatives and government officials from multiple jurisdictions and provided an informative and thought-provoking insight into the most significant challenges for competition and regulation in online and digital markets. The keynote speech was delivered by Dr Andrea Coscelli, Acting Chief Executive, Competition and Markets Authority. The next conference is currently in the process of being organised and will take place in the autumn of 2017.

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Articles

Centre for Antitrust and Regulatory Studies (CARS)

www.cars.wz.uw.edu.pl

The Centre for Antitrust and Regulatory Studies, CARS (in Polish: *Centrum Studiów Antymonopolowych i Regulacyjnych*), of the University of Warsaw Faculty of Management, established in 2007, became starting from 1 October 2014 an independent organizational unit of the Faculty of Management to engage in teaching and research activities in the field of economics and law of antitrust and sector-specific regulations.

CARS conducts cross and interdisciplinary academic research and development projects, provides consulting services as well as publishes books and periodicals, including the English language Yearbook of Antitrust and Regulatory Studies, YARS (www.yars.wz.uw.edu.pl) and the Polish language Antitrust and Regulation e-Quarterly, iKAR (in Polish: *internetowy Kwartalnik Antymonopolowy i Regulacyjny*, www.ikar.wz.uw.edu.pl). Moreover, CARS organizes scientific conferences and workshops, offers Post-graduate studies (www.aris.wz.uw.edu.pl) and an Open PhD Seminar. CARS co-operates with scientific institutions in Poland and abroad as well as with the Polish competition authority and national regulators in the energy, telecommunications and railways sectors.